IN THE SUPREME COURT OF THE UNITED STATES.

The United States, Complainant,
vs.
The Joint Traffic Association et al.

October Term, 1897.
No. 341.

CONDENSED STATEMENT OF THE ORAL ARGUMENT OF MR. GEORGE F. EDMUNDS ON THE TWENTY-FIFTH DAY OF FEBRUARY, 1898.

Before the agreement in question was made the rates of each road had been independently and fairly established by itself, and duly filed with the Interstate Commerce Commission; and these rates were in truth just, reasonable, and in conformity with law in every respect, and were in full operation.

This is admitted by pleadings.

This being true, these rates could not have been either raised or lowered, under then existing conditions, without injustice to patrons or else injustice to those interested in the roads, including the people along their lines, as well as through shippers.

To have changed any of them would have been against justice and reason, disobeying the first commandment of the commerce law.

In this state of things the agreement was made. The preamble contains five distinct declarations, as follows:—

(1) To aid in fulfilling the purposes of the Interstate Commerce Act; to co-operate

(2) with each other and adjacent transportation associations to establish and maintain

(3) reasonable and just rates, fares, rules, and regulations on State and interstate traffic; to

(4) prevent unjust discrimination, and to secure the reduction and concentration of agencies

(5) and the introduction of economies in the conduct of the freight and passenger service. (Record, page 17.)

Every one of these declarations is admitted to have been true in all respects; and it is admitted that there was no other purpose, and no secret or covert design in respect of the subject. The preamble thus became, certainly as between the parties to it, the constitutional guide in the interpretation of the body of the contract. I have pointed out the grounds on which this contention rests in my brief, and need not enlarge upon them.

The parties next declare that they "make this agreement for the purpose of carrying out the objects above named." (Record, pages 18, 19.)

The first six articles of the contract provide for organization and administration (Record, pages 19–27), in respect of which no criticism has been suggested, except as to section 5 of Article V. (Record, page 26), in connection with the Solicitor-General's contention in regard to Article VII. (Record page 27).

Article VII. is the first one that is assailed in respect of its fundamental character. It is the fundamental one in regard to rates. If it violates law, it is bad, and must not be put in execution. If it provides for the fullest obedience to law and promotes trade, it must be upheld.

The first section provides:—

"SECTION 1. The duly published schedules of rates, fares, and charges and the rules applicable thereto now in force and authorized by the companies parties hereto upon the traffic covered by this agreement (and filed with the Interstate Commerce Commission as to such of said traffic as is interstate) are hereby reaffirmed by the companies composing the association, and the companies parties hereto shall, within ten days after this agreement becomes effective, file with the managers copies of all such schedules of rates, fares, and charges, and the rules applicable thereto." (Record, page 27.)

This section is the immediate and affirmative act of the association. Its essence is that all parties agree to abide by the pre-existing just, reasonable, and lawful rates then on file with the Interstate Commerce Commission. It has not been contended by the learned Solicitor-General that this section is contrary to law. It is submitted with confidence that no such contention can be made, and that if the association agreement had stopped there, the agreement would have been simply one to stand by just and reasonable rates independently fixed, on file with the Interstate Commerce Commission, which would be agreeing to do the very thing that the plain words of the statute commanded should be done. The commerce law does not demand competition; it only demands justice, reason, and equality. Every one of its clauses is devoted directly to these ends; and the competition that produces departure from the reason and justice and equality that the Act requires violates the essential principle upon which it is founded.

I take it to be plain that if these thirty-one defendants had united in an engagement to truly and faithfully adhere to and carry out in their respective conduct all the requirements of the commerce law, and had agreed to the imposition of penalties for infraction, it would be manifest that they had not contracted to restrain trade, either in a general or a partial sense, or any sense whatever. In the instance of this first provision of the agreement, they have engaged to do that very thing and that very thing only in the form of specific language referring to a specific and existing just, reasonable, and lawful state of things which they were then acting upon.

The second section of Article VII. (Record, page 28) is the one upon which the principal assault of my learned brother on the other side is made. He maintains that the language used in describing the powers and duties of the managers is intended to be evasive and to conceal its real purpose, and to make the managers the absolute masters, subject to an appeal to the board of control (being the presidents of all the roads), of the changing and fixing of future rates. The first answer

to this is that the pleadings distinctly admit that there was no evasive intention, or other unjust purpose, in any part of the arrangement. It is, therefore, not just to maintain what the record admits to be untrue.

But whatever construction or implication may exist in respect of the language of this section, it is sufficient to say that the very next section of the same article declares that

"The powers conferred upon the managers shall be so construed and exercised as not to permit violation of the Interstate Commerce Act, or any other law applicable to the premises, or any provision of the charters or the laws applicable to any of the companies parties hereto, and the managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in the rates, fares, charges, and rules established hereunder."

Here is, in words as clear and specific as the English language is capable of, a distinct jurisdictional limitation upon the powers of the managers, as described in the preceding section, and in terms the clause provides that the powers conferred upon the managers shall be so construed and exercised as not to permit the violation of the Interstate Commerce Act, or any other law, and so forth; and it commands the managers to co-operate to these ends with the Interstate Commerce Commission.

When the managers come to act, then, under these powers, how do they start? They start with a system of rates established, not by the agreement, but before it was made, and confirmed by the agreement, which were confessedly in conformity with and in promotion of the Commerce Act, and which were absolutely just and reasonable. The managers are to have authority to recommend such changes in those rates and fares as, by the very words of the second section, may be reasonable and just and necessary for governing the traffic and protecting the interests of the parties. Reasonableness and justice is the first and fundamental condition of their starting to act at all, and it is declared that they shall not act otherwise than in conformity with the requirements I have already mentioned contained in the Commerce Act. Can this be an authority to restrain trade under any definition of the word restraint? The

only restraint is a restraint against a violation of law by the managers in agreeing upon unreasonable and unjust rates against the requirements of the Commerce Act. If we assume that the restraint of trade mentioned in the Trust Act may be a restraint of innocent and just proceeding, can any one maintain that it makes illegal an agreement not to violate law, but to obey it?

It was obvious when this agreement was made that rates then existing and being in all particulars reasonable and equal, might, in the course of changes in production, trade, and under other conditions over which the railways could have no control, become unjust, unreasonable, and inapplicable to the new conditions, and that in such case both public and private interests would require that readjustments should be made in order to bring the rates into conformity with what reason, justice, and law should require under such conditions. It was to provide for this that sections 2 and 3 of the seventh article were inserted. As I have said, they were inserted in such clear language that it would be impossible for the managers to agree upon any rates in lieu of the just one then existing, that were not, in the same sense and to the same extent, just, reasonable, and for the public interest, as those then existing. The managers must act in that way and to that end, or else they were forbiddden by the very terms of the agreement to act at all.

If the managers, contrary to their authority, should have agreed upon a new rate which any one of the independent roads thought to be wrong in itself as being unreasonable and not in conformity with the requirements of the article and of law, that company, or any number of companies affected, could lawfully and justly (as would be its bounden duty) refuse to conform to the rate of the managers. But it is asked, would not the road thus refusing be subjected to the fines and forfeitures provided in another part of the agreement, and would not it be turned out of the association? I answer emphatically, no. If any such thing were attempted under the circumstances named, the company could defend itself in a court of justice against any such wrongful exaction, and could com-

pel the managers and its associate roads to obey the contract, and to give it its just equality of treatment that it was before entitled to. The Commerce Act itself in terms requires the same reasonable and just conduct by railways towards each other as it does in their treatment of their customers and the public. I most earnestly maintain, therefore, that the whole and every part of Article VII. is perfectly valid under any possible construction of the language of the Trust Act, as well as in perfect conformity with and in aid of the Commerce Act.

I may as well here compare the provisions of Article VII., which contains the great leading feature of the whole agreement, with the agreement in the Trans-Missouri case. The difference is broad and fundamental. In this case, as I have shown, the rates agreed to be adhered to in the first section of Article VII. had already been independently established, were, in fact, reasonable and just, were on file and inferentially approved by the Interstate Commerce Commission, and they had been assailed by nobody, and the whole trade of the country affected was proceeding under them with advantage to the shippers, to the people along the lines of the roads, to the railways themselves, and to the general interests of the country. It was an engagement to stand by that state of things and for the express purpose of continuing that happy state of things—exactly those that the law requires—that this engagement was made. Turn now to the Trans-Missouri agreement on the same part of the subject. That agreement did not propose or profess to stand by any then existing rates, it did not indicate that the rates then existing were just or reasonable, but it proposed to put into the hands of its managers the power to establish *de novo* reasonable rates, &c.; and, in the very words of the agreement, for the purpose of mutual protection, and for nothing else.

The Trans-Missouri agreement imposed no restriction upon the discretion of its rate-making board; it did not impose and did not, evidently, intend to impose the distinct barriers of the law between the powers of its rate board and the people and any one of the roads concerned. It did not profess to look to any other interest than the exclusive interest of the parties

themselves; and it will be seen, on a careful study of it, that it was construed and constructed for the sole purpose of keeping up and increasing rates, instead of for the purpose (as in the Joint Traffic agreement) of keeping them just and in conformity with law, whether by reduction, increase, or other readjustment.

Other essential differences are stated in my brief which I need not take the time of the court to enlarge upon.

These differences are illustrated by what the pleadings in the two cases show. In our case, the practical operation of the agreement has been to continue the same competition that existed before. This is admitted. It has been to continue the same just and reasonable rates previously established, and to give a co-operative and advantageous service upon equal terms to everybody and of equal benefit to the whole public. The bill in the Trans-Missouri case alleged—there being, it will be remembered, no previously established rates that were agreed upon—that the parties had refused to establish and give their customers just rates. The answer did not meet the charge, but evaded it in the manner that the court will see stated on page 34 of my brief. The practical construction by parties to contracts in their operations under them has always been considered an important element in determining the true character and meaning of the contract. What I have now stated shows the operating difference between the two contracts.

The next principal contention of my learned brother is that Article VIII. of the agreement violates the Trust Act by restraining trade.

The words of the article are as follows:—

"ARTICLE VIII.

"PROPORTIONS OF COMPETITIVE TRAFFIC.

"The Managers are charged with the duty of securing to each company party hereto equitable proportions of the competitive traffic covered by this agreement so far as can be legally done." (Record, page 29.)

This article provides that the managers shall endeavor so far, and so far only, as obedience to law—that is to say, conformity with the Commerce Act and conformity with the Trust

Act—would permit, to secure equitable proportions of the competitive traffic to each one of the companies. It is a sufficient answer to my brother's contention to say that the very terms of the article do not require or invite or allow the managers to act under it at all otherwise than as the law shall permit. If, therefore, the Trust Act condemns the effort referred to, then not to make the effort. If the Interstate Commerce Act, either in terms or spirit, is adverse to such an effort the managers are not authorized to take a step. Does it violate the law to merely authorize an agent to do something in the course of business so far, and so far only, as the law will permit?

But I contend that it was in conformity with law that each company should have an equitable proportion of the traffic. What does equitable mean? It means that which right and justice and the public interest require. What did justice and public policy require? And what does it still require in respect of the nine great lines connecting the western lakes and the valley of the Mississippi and the whole continent beyond with the Atlantic seaboard? Was it not just and necessary to public interest that each one of these roads, passing through great extents of country, and having along them populations and interests to whose welfare the existence of each one of these roads were necessary, should be considered with reference to the through traffic which should come from beyond? The question answers itself. It is obvious, then, that just so far as each road should be enabled to carry the through traffic that naturally belonged to it, by just so far the people along the whole length of its line would be benefited by increasing the income of the line and thereby contributing to its support and to its ability to make lower rates to all its people from one end of the line to the other. This provision of the eighth article then, I submit, was wholesome, lawful, and necessary, and it was the very thing that one of the clauses in the Commerce Act and the spirit of all its provisions required.

I may be allowed to say a word in respect of the objection that no one of the roads could change its rates without giving thirty days' notice, and therefore that this was a re-

straint of trade, in one sense or another. It will be seen on examining the agreement that each road had the absolute right, under the agreement and pursuant to its provisions, to change its own rates, and still continue a member of the association. (Record, pages 28, 34, 35.) This being so, it seems to me impossible to contend that any part of the agreement was any sort of restraint, unless it can be established that the thirty days' notice was too long. It is a matter of history that when the Commerce Act was passed there was inserted in it the requirement that no rate should be raised except on ten days' notice, and none should be lowered except on three days' notice, publicly displayed. What was the principle of this? It was that justice and fair play to customers and to the public and to all persons directly or indirectly interested in transportation required that sufficient and timely knowledge of changes in rates which, as we know, affect in a greater or less degree all commercial and productive transactions, should be had by every person and community interested. I suppose I may properly state it as a public fact, now known to everybody engaged in business, that the time fixed in the Commerce Act for notice was much too short, and that unjust inequalities have arisen, again and again, from changes in rates by particular roads on such short notice that favored customers and favored localities, &c., would get advantages over others, in violation of the spirit and substance of the Commerce Act. It was for the purpose, then, and with the effect of producing the widest fair play and equality among all persons, all roads, and all communities, that this period of thirty days instead of ten was agreed upon. It was obviously right, and being right, it should not be condemned, unless the rigor of a law that cannot be otherwise construed and applied compels it.

I submit with sincere confidence, as it regards the provision I have just spoken of, as well as it regards all the other provisions of the contract, that, instead of being even a partial restraint of trade, they are all provisions of constraint in support of and in promotion of trade. Trade is a general word, and its operations, like all other operations that require cooperating and associating forces and arrangement, are ad-

vanced by, and indeed, cannot be carried on truly and honestly for public interests without checks and regulations, some of which may restrain and regulate the behavior of a particular element in the whole operation, and by doing so do not restrain but advance and promote the whole; just as, to take the simplest of illustrations that occurs to me, in mechanics, the safety valve of a locomotive, with its counterweight, regulates and restrains, or gives off, the accumulating steam in the boiler, in the first place conserving it, restraining it from escape, and in the second place, enabling it to escape. But all this does not restrain the operations of the locomotive; it is necessary to its best and safest performance of duty. A hundred illustrations might be given.

My brother on the other side suggests that the clause in the agreement providing for abolishing soliciting agencies is a restraint of the trade. I have stated in my printed points my answer to this. I may add, however, that soliciting trade or ceasing to solicit trade is not trade itself, and does not belong to it, even as an incident. Wherever it is practiced, it is practiced apart from any act of trade; it precedes it, and sometimes leads up to it, and sometimes repels it. It was perfectly competent, therefore, and certainly wise, for these roads to agree to abolish such agencies, and to join, so far as it might be convenient to do for the information of the public, in having agencies at various important points to assist shippers and manufacturers in the most rapid and economical transmission of their productions. The plan, therefore, substituted for the old practice is one far more advantageous to the public who wish for honest and equal dealing than the old practice. But I submit that whatever character may be imputed to soliciting business, it does not fall within the authority of Congress to regulate it at all. While it is going on the business solicited has not reached the point of being interstate commerce, and cannot reach it until its movement has commenced, or is about to commence, definitely from one State to another.

I refrain from making any observations on the constitutional question arising if the Trust Act is to be construed as forbidding innocent contracts promotive of public policy, which I have in-

sisted upon in my printed points, for the reason that in the division of our subjects of discussion this matter will be left entirely to my brother Mr. Phelps.

In respect of the meaning of the words of the Trust Act, I beg to ask your Honor's careful attention to the suggestions I have ventured to make in my printed points. I need not enlarge upon them, and have only to call your attention, first, to the grammatical construction of the first section, and, second, to the citations I have made from law writers, showing a distinct and separate classification of the two phrases, restraint of trade in general and partial restraint of trade. If these writers are correct (as nobody doubts, I think, they are), and the two phrases were known and treated in the law at the time of the passage of the Act as separate things, the one obnoxious and the other just and wholesome, then I respectfully and earnestly insist that the universal rule of construction requires that the words in the Act shall be assigned to the first class, and not carried over into the second.

I have thus alluded to the larger part of the points made in my printed brief, and as I have occupied my full share of the time, I will conclude by stating that I insist upon all the points stated in the brief, and will ask the court to consider them.

GEORGE F. EDMUNDS.

NOTE.—As no report was taken of my oral argument, I have been only able, imperfectly, to reproduce its principal parts in this condensed form, and, possibly, not in the order in which the argument was orally made.

G. F. E.